

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

X

77-7005

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRESCOTT H. RATHBORNE,

Plaintiff-Appellant,

-against-

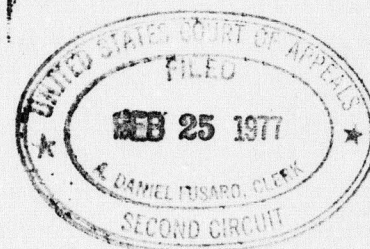
CITADEL MANAGEMENT CO., INC., URBAN
RELOCATION CO., INC., EDWIN J. GLICKMAN,
SALBIAN REALTY CO., INC., SILTAN
DEVELOPMENT CORP., WOAS PROPERTIES CORP.,
and MADISON ASSOCIATES,

Defendants-Appellees

APPEAL FROM ORDER OF SOUTHERN DISTRICT
COURT GRANTING DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRESCOTT H. RATHBORNE,

Plaintiff-Appellant,

-against-

CITADEL MANAGEMENT CO., INC., et al,

Defendants-Appellees

APPELLANT'S BRIEF

Preliminary Statement

This is an appeal from an order of Hon. Charles L. Brieant of the United States Southern District Court granting the defendants' motions for summary judgment (A-3 to 13).

Issues for Review

1. Whether appellant was limited to the rent-control statutory harassment remedy for acts committed by parties who owed no landlord obligation to him and to whom he owed no obligation as a tenant, which acts were committed on premises other than where appellant lived, and which he claims constituted a nuisance.
2. Whether the founders and directors of a corporation may pierce their own corporate veil.
3. Whether a jury could have concluded that the combination of the acts complained of were illegal and thus a nuisance per se.
4. Whether an act technically legal may constitute a nuisance.
5. Whether defendants' acts in the particular circumstances of the case constituted a nuisance was a question of fact which should have been left for the determination of the jury.

Nature of the Case

This is an action against the "developers" of the block where plaintiff lived for various acts which he claims caused him suffering and forced him to vacate his apartment. The action was

commenced in the Southern District Court of New York on the basis of diversity of citizenship (A-14). After issue had been joined (A-17 to 29), all defendants moved for summary judgment (A-30, 126). These motions were granted by Judge Brieant of the Southern District Court (A-3 to 13) from which this appeal has been taken. Subsequently, the action has been discontinued against defendant WOAS (A-229).

The Facts

At the end of 1965, Mr. Rathborne rented two apartments on East 53rd Street in Manhattan (A- 199). At the time, both of these apartments were rent-controlled (A- 142). He resided in those apartments until November, 1972 when he alleges he was forced to move because of the acts complained of. (A-15).

Around the beginning of 1970, a group of real estate developers including Mr. Glickman decided to assemble the block on which plaintiff resided in order to erect an apartment-commercial complex (A-143). They formed a partnership called Madison Associates (A- 201) for this purpose. Under that partnership's auspices, a number of nominee corporations were formed to hold the various parcels of land they acquired (A-40,200). By 1972, the Madison group had acquired a majority of the block (A- 173). The group had acquired the underlying fee title to the building where Mr. Rathborne lived (A- 40), holding title in the name of various nominee corporations during the period in question. That particular property, however, was subject to a leasehold which the group had not yet succeeded in obtaining (A- 40).

Both in the buildings they owned, and in the buildings they were seeking to acquire, it was necessary for the occupants to move so that the buildings could be demolished and the proposed project be built. In furtherance of this end, the Madison group

entered into agreements with Urban Relocation Co. and Citadel Management Corp., interrelated entities whose business was to bring about the relocation of tenants for developers (A-42). Among other things, Urban-Citadel was authorized to offer stipends to tenants for vacating their apartments: such authorization was specifically given with regard to Mr. Rathborne's building (A-197).

Some tenants were relocated through payment of stipends. A number of other tenants, however, did not wish to move, either because they had financially non-compensable connections with the community, because, like plaintiff, they had huge investments in their apartments which could not begin to be matched by the stipend offered (A-142) or for a host of other reasons. When these tenants occupied rent-controlled apartments, the situation became far more complex for the developers since so long as they paid their rents and did not otherwise engage in gross violations of their tenancy, it was practically impossible to cause them to move involuntarily.

Between 1970 and 1972, the defendants engaged in a number of acts which, although technically legal in themselves, were, according to plaintiff's allegations (A-15) in actually undertaken to cause plaintiff and other recalcitrant tenants on the block to involuntarily leave their apartments. These acts included the ugly tinning of windows in vacant buildings, allowing vacant buildings to deteriorate so that they became havens for derelicts, posting huge signs on the block indicating that the tenants on the block were being relocated, and moving a large number of drug rehabilitation centers to the block (A-15,144,167-170). While few of these acts were technically illegal, and some of them, such as providing

providing drug rehabilitation centers with facilities, were superficially lauditory (A-11), in actuality, according to plaintiff's contentions (which must, of course, be accepted as proven for purposes of a summary judgment motion) they were not undertaken for any reason except to make life on the block so unpleasant that the remaining tenants would move and the developers could proceed with demolition. (See, e.g., A-194)

Plaintiff was far from alone in this contention: a number of articles appeared in the newspapers and magazines about the situation (A-171-178), and a group of tenants, including Mr. Rathborne, formed the East Fifties Association (A-179-85) whose specific purpose was to oppose what was happening on the block. The activities of Urban Relocation and Citadel Management, which included but which were far from limited to this block, caused great concern to both the Attorney-General of New York State (A-188) and the New York City Housing and Development Administration (A-145).

As time went on and more and more buildings became vacant or were turned over to the drug centers, the situation on the block became more and more intolerable (A-171). Perhaps because he realized that causing plaintiff to vacate would greatly increase the value of his leasehold (as plaintiff was the only remaining rent-controlled tenant in the corner building), Mr. Rathborne's immediate landlord also began applying increasing pressure to him. Among other steps, he filed an application to decontrol one of the apartments that plaintiff had rented: that application was granted in September of 1972 (A- 159). In July of 1972, Mr. Rathborne filed a harassment complaint with the rent commission against his landlord. However, by November of 1972, he still had not been able to secure a hearing upon it (A- 115-22).

By November 20, 1972, the situation had become so intolerable on the block that, despite his huge investment in the apartment where he had expected to live for the rest of his life which was a not-unreasonable assumption to make under the rent-control statutes, Mr. Rathborne was forced to move. A few months thereafter, his harassment hearing at the rent-control office still not scheduled, he commenced an action in the Southern District Court against some of the within defendants as well as his immediate landlord for conspiracy to constructively evict him from his apartment. After completion of pre-trial depositions, it became clear that a relationship between the developers and Mr. Rathborne's immediate landlord (the person holding the leasehold on the property) could not legally be established, and so that action was discontinued without prejudice (A-100-1) against all but his immediate landlord. That case came to trial in 1974 before Judge Solomon. Although the trial judge was fully aware of the still-pending statutory harassment proceeding (A-123), he neither stayed the suit pending the administrative determination, nor did he dismiss the suit on the basis that the statutory proceeding was exclusive. He did, however, dismiss the suit on the ground that it was one for constructive eviction and that (1) Mr. Rathborne had waited too long after the acts complained of before moving in order for those acts to constitute an eviction, and (2) the prime motivating cause for plaintiff's move was not the acts of the immediate landlord, but rather of the developers (A-102). That decision was subsequently affirmed on appeal.

In the meantime, plaintiff commenced the within action against the developers and their agents for the acts discussed earlier. It is important to point out that since the developers

never concluded their negotiations for the leasehold --shortly after Mr. Rathborne moved, the bottom fell out of the New York real estate market, and the developers abandoned the project (A-168) -- none of the acts complained of occurred in the building where plaintiff lived. Rather, they all occurred in buildings immediately adjacent or otherwise on the block, but it is Mr. Rathborne's allegation that their purpose was to make the entire street including plaintiff's apartment, uninhabitable.

After joinder of issue, all of the defendants moved for summary judgment (A- 30, 126). Judge Brieant granted those motions (A-3 to 13) on the grounds that (1) the statutory harassment remedy was the exclusive remedy which plaintiff could pursue, and (2) in any event, since all of the acts complained of were legal, no recovery in nuisance or otherwise could be awarded. An appeal to this Court was duly taken.

Argument

POINT ONE: NOT ONLY IS THE STATUTORY HARASSMENT REMEDY NOT EXCLUSIVE, IT IS INAPPLICABLE TO THE CASE AT BAR.

Section 78(b) of the City Rent Regulations provides that

Any tenant who has vacated his housing accommodations because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engages in any course of conduct (including but not limited to interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use and occupancy of the housing accommodations may, within ninety days after vacating apply to the Administrator for a determination that the housing accommodations were vacated as a result of such conduct....

The section goes on to provide for a subsequent treble damage civil action. The Court below held (A- 7 to 10) that this was the exclusive remedy available to plaintiff for the acts complained of in this action, and on that primary basis, dismissed

the complaint.

The Court was fully aware that half of the premises plaintiff was forced to vacate had been decontrolled several months prior to his vacating. The City Rent Regulations apply only to rent-controlled apartments. Therefore, the remedy to which the Court referred could not possibly apply to the decontrolled portion. Nonetheless, the Court below discounted this issue because plaintiff had requested Judge Solomon in the prior trial to stay his determination pending an administrative hearing and "litigants should not be rewarded for blowing hot and cold in a lawsuit in accordance with their immediately perceived short term interests" (A-9). Apart from the fact that (1) there is no rule preventing a party from pleading or arguing inconsistently, and (2) neither Judge Solomon or anybody else ever accepted this particular one of a large number of arguments advanced by plaintiff throughout that prior litigation, there was no reason why Judge Solomon might not, had he so chosen, stayed that entire proceeding even though the administrative hearing would involve only a portion of the apartment rather than issuing two separate opinions at two separate times. In any event, whether or not premises have been decontrolled is a matter of objective law -- in this instance a Rent Commission order issued September 7, 1972 (A- 159)--and it is that order, and not how a party chooses to interpret it that is controlling. If the premises had been decontrolled, the fact that plaintiff subsequently argued that they were controlled (assuming, for the moment, that to be the case) would not subject them to control, and there seems to be no dispute that one of the apartments Mr. Rathborne had rented and from which he claims defendants forced him to move in November, 1972 had in fact been decontrolled by order of September 7, 1972. Thus, as to that

apartment, statutory harassment could not possibly be a remedy, no less the exclusive remedy.

Nor is it the exclusive remedy for the apartment which was still controlled on November 20, 1972. It is true that a party cannot pursue a harassment complaint against his landlord except in accord with the statutory provision if he lives in a rent-controlled apartment. Montalbano v. DeLuzio, 39 Misc.2d 834 (A.Term 2d. 1963); Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969). "Landlord" is specifically defined in Section 2(h) of the City Rent Regulations

as: "An owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use and occupancy of any housing accommodation or an agent of any of the following."

In one case, Gabel v. Eichner, 38 Misc.2d 844 (S.N.Y. 1963), the court extended the definition of "landlord" to include the underlying fee owner where, in the particular circumstances of the case, the intermediary lessee was only a technical entity, and in fact the underlying fee owner was acting as landlord.

For a number of reasons, the Gabel v. Eichner doctrine is not applicable to the case at bar. To begin with, none of the defendants even claim that they were acting in any way as plaintiff's landlord: in fact they go out of the way to point out that they did absolutely nothing in the particular building where plaintiff lived (A- 33,42,69). Specifically, they did not receive, nor were they entitled to receive rent for the use and occupancy of any housing accommodation in the building where plaintiff lived. Nor do they claim that any of them were in any way the agent of plaintiff's landlord: in fact, in a number of places in their papers, they emphasize their independence from him. (A-59,75). Thus, there is no way that any of the defendants fit even the Gabel v- Eichner extension of the "landlord" definition.

Secondly, even were some of the defendants somehow construed to be "landlords" under the rent control statute definition, none of the acts complained of were performed by them in such capacity. In fact, none of them are even claimed to have occurred on the premises where plaintiff lived. Because someone happens to be another person's landlord, that does not mean that every act he performs in relation to his tenant is performed in a landlord capacity. For example, plaintiff's immediate landlord (not a party to this action) happened to own a liquor store around the corner from where plaintiff lived. If, in the capacity of a liquor store owner, he overcharged plaintiff on a purchase, plaintiff would not be relegated to a rent commission proceeding to obtain relief. In the case at bar none of the acts complained of -- the tinning of windows, the posting of ungainly signs, the admission of drug centers -- bore any relation to the fact that any of the within defendants happened to own the underlying fee on the building where plaintiff lived. Rather, these acts were able to be perpetrated because the defendants (or their principals) owned other parcels of property on the block. No case has been cited, nor has any reason been given either by any of the defendants or by the Court below, to limit one to the statutory harassment process for acts which take place on premises other than where the tenant lives. Were there any basis for such an extension, it would most properly be made through amendment of the rent regulations, or at the very least by a state court. . . There is no reason why this court should choose to extend the statutory harassment doctrine to areas beyond which any state court has considered it applicable.

Finally, even were the doctrine somehow extended to acts performed on other property purely because the same parties happened

also to own the underlying fee of the building where the tenant lived (although they did not receive rent or otherwise perform any act as landlord in conjunction with that building), it still would not cover defendants Glickman or Madison Associates. The underlying fee was owned at various times by defendants WOAS¹, Siltan and Salbian (A- 143). Defendants Urban and Glickman were their agents (A- 197) although there were almost no functions they had to perform with respect to the building where Mr. Rathborne lived. Defendants Glickman and Madison Associates seek to include themselves in the "landlord" definition making the statutory remedy exclusive by saying that they in effect are the same as the corporations which owned the underlying fee. Of course, it is plaintiff's argument that these corporate entities were in fact no more than nominal owners under the control, direction and supervision of Mr. Glickman and his partners in Madison Associates (A-15,143), but it is one thing for a party suing another to seek to pierce a corporate veil, and quite another for a party to seek to pierce his own corporate structure.

..... The partners of Madison Associates went through elaborate procedures constructing different corporations to own different properties (A-40,200), transferring the properties in a highly complex manner back and forth between the corporations (A- 143). These defendants may not choose, now that it seems to suit their own interests, to claim that the whole structure which they themselves designed was in fact a sham, and therefore they were in fact the underlying fee owners of the premises where plaintiff resided which is the only way they possibly under any stretch of the definition be included in the exclusive statutory remedy of Section 78 of the

City Rent Regulations, assuming for the moment that it were

1. Since the only interest WOAS held was ownership of the underlying fee of the building where plaintiff lived, and had no interest in any other building, the action against it has been discontinued (A- 229) as nuisance requires an interest in an adjacent property

otherwise applicable:

Estoppel to deny corporate existence has also been applied to the corporation itself and its stockholders, and to its promoters, incorporators and officers.

11 NY Jur Rev Corporations "Estoppel to Deny Existence of Corporation" §62

Geneva Mineral Springs Co. v. Coursey, 61 N.Y.Supp. 98 (4 Dept 1899)

Rochester v. Bergen, 30 N.Y.S.2d 877 (2 Dept. 1941)

Thus, even were the corporate entities which owned the underlying fee where appellant lived held to have been active enough to fall within the definition of "landlord" under Gabel v. Eichner, supra (which, as discussed earlier, they were not) this still would not include Mr. Glickman or Madison Associates who can show no interest whatsoever in the premises except by piercing their own corporate veil.

Of course, Mr. Rathborne, insofar as he remained a statutory tenant in one of the apartments he rented, had a right to file a harassment complaint with the rent commission. To the extent he could obtain a remedy at that administrative agency, he did not have a right to bring a legal action for the same relief in the courts. Indeed, he has pursued that course (contrary to the finding of the court below [A-10], and it is now an Article 78 proceeding before the Appellate Division, Second Judicial Department of the New York State Supreme Court¹. Indeed, it would be absurd for a tenant to bring an ordinary action in a court proceeding if, for the same injury, he could obtain treble damages (as are awarded under Section 78 of the City Rent Regulations) through administrative action.

However, because a statutory tenant can in certain situations file a Section 78 administrative statutory harassment complaint,:

1. The issue in that appeal has nothing to do with whether or not statutory harassment occurred, but rather with whether the Article 78 proceeding was timely commenced. It is entitled Rathborne v. Housing & Development Administration and is scheduled to be heard at the March, 1977 term.

"this does not mean that statutory tenants are never entitled to obtain the assistance of the courts." Barbee v. 2639 Corp., 284 App.Div. 298 (A.D.1st 1954), 301. Even as against the immediate landlord, where the issue is not harassment, and therefore where the administrative agency does not provide relief, a court proceeding is proper. That was the necessary finding of Judge Solomon of the United States Southern District Court in the constructive eviction action that Mr. Rathborne brought against his immediate landlord (A-102-7).

In the case at bar, not only are we not dealing with a landlord within the purview of the rent control statute, we are not dealing with acts of harassment, but of nuisance, and we are not dealing with acts that occurred on the premises where Mr. Rathborne resided, but rather on adjacent premises. Indeed, if the acts had occurred on the same premises where Mr. Rathborne resided, a nuisance complaint would not even be in order, since nuisance necessarily involves an act on separate premises:

The essence of a complaint in nuisance is that a condition is maintained on one property which is an illegal burden or servitude upon another. Zamzok v. 650 Park Avenue Corp., 80 Misc.2d 573, 363 N.Y.S.2d 868 (S.N.Y. 1974)

No one may make an unreasonable use of his premises to materialize an injury of his neighbors' premises, and if he does the latter has a right of action even if he is not driven from his dwelling, provided the enjoyment of life and property is materially lessened. Frank v. Cossitt Cement Products, Inc., 197 Misc. 670 (S. Madison 1950)

Michelman v. Rivera, 240 N.Y.S.2d 859 (Civ. Bnx. 1963)

For all of the above reasons, the statutory harassment administrative proceeding does not apply to acts not committed by a landlord and which are not committed on the premises where a tenant lives, and therefore it was not a remedy available to Mr. Rathborne for the acts complained of, no less an exclusive remedy.

POINT TWO: WHETHER IN THE GIVEN CIRCUMSTANCES, THE ACTS COMMITTED BY DEFENDANTS CONSTITUTED A NUISANCE WAS A QUESTION OF FACT TO BE DETERMINED BY THE JURY

On any motion for summary judgment, all inferences to be drawn must be in the light most favorable to the party opposing the motion (in this instance the plaintiff) and if, upon drawing such inferences, there is any issue as to any material fact, the motion must be denied.

On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.

United States v. Diebold, 82 S.Ct. 993, 994, 369 U.S. 654 (1962)

The court should deny a motion for summary judgment where there is a genuine issue as to any material fact.

Adickes v. S.H.Kress & Co., 398 U.S. 144, 90 S.Ct.1598 (1970).

Indeed, if under any such favorable inference of the facts, a cause of action is established, even if not pled, the proper procedure is to grant the party opposing the motion leave to amend rather than to grant summary judgment. Forman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227 (1962); Freeman v. Midland Bank of New York, 494 F.2d 1334 (2d. Cir. 1974); Kossiter v. Vogel, 134 N.Y.S.2d 908 (2d. Dept. 1943).

In the case at bar, there was no dispute as to the existence of certain of the activities of the defendants: the tinning of windows, the posting of relocation signs, the moving of drug rehabilitation centers to the block. There was, however, dispute as to whether defendants allowed derelicts to congregate in the abandoned buildings which it owned (A- 170) and also whether the huge population of drug addicts which came to the block after 1970 was caused by the drug agencies which defendants allowed on the block, or rather by a methadone maintenance center

which had moved across the block (A- 15, 48¹). On both of these issues, the inference should have been drawn in Mr. Rathborne's favor. Instead, the court below drew no inference from one of the issues, and on the other determined it in favor of the moving parties (A- 11).

The Court below also held that "each activity taken alone was lawful" (A-11). To begin with, at least as to the posting of signs, that is not the position of the Building Department (A-196). Moreover, whether or not the individual activities were lawful is a very different question from whether they were lawful in combination: it is one thing to tin an isolated window or post an isolated sign and quite something else to tin hundreds of windows, post a barrage of signs, and move a huge number of drug rehabilitation centers on a block which previously had no drug problem. The fact that both the Attorney-General of New York State (A- 188-195). and the Housing and Development Administration (A- 145), the very agency whose expertise defendants laud when they plead for the exclusiveness of the statutory remedy (A- 90) were concerned about the lawlessness of these activities in combination at the very least allows an inference that they were illegal, which is all that is necessary to defeat the summary judgment motions.

If these acts in combination could create an inference of illegality, then the Court below had to assume, for the purposes of this motion, that such inference would be proven at trial, and therefore that they would be nuisances per se (A-12), i.e. that the burden of proof would be transferred to the defendants to prove that in the particular circumstances they would not in fact be nuisances. See also 58 Am.Jur.2d Nuisances §13. However, even were there no basis for an inference of illegality, that still
1. The finding that that center was "poorly maintained" (A-12) was yet another matter of fact which, if relevant, should have been left for jury determination.

would not warrant dismissal of the action since the fact that an act may technically be legal does not mean that in the particular circumstances it does not constitute a nuisance.

American Electronics, Inc. v. Christo Poulos Co., Inc.,
43 Misc.2d. 302, 250 N.Y.S.2d 738 (S.Kings 1964)

DeMuro v. Havranek, 153 Misc. 787, 275 N.Y.Supp. 186
(S. Westchester 1934)

What has always mattered in determining whether or not an activity constitutes a nuisance, whether it be a dam, a glue factory, or a methadone clinic, is not the abstract nature of the activity but rather the particular location in which the activity occurs:

In considering whether an activity is a nuisance, the court must be mindful of the location and surroundings as well as other circumstances. An activity which occurs in a particular location and surroundings may be reasonable, while the same activity in other surroundings may be a nuisance [Town of Preble v. Song Mountain, Inc., 62 Misc.2d 353, 308 N.Y.S.2d 1001]
Puritan Holding Co., Inc. v. Holloschitz, 372 N.Y.S.2d 500, 502, 82 Misc.2d 905 (S.N.Y. 1975)

Indeed, even the activity of drug rehabilitation, which the Court below quite properly lauded in the abstract (A- 11) may in particular circumstances constitute a nuisance, and whether it does in those circumstances constitute a nuisance is a "question of fact" which only the jury¹ could properly determine. People v. HST Meth, Inc., 43 A.D.2d 932, 352 N.Y.S.2d 487 (A.D.2d 1974). In another circumstance, a hospital was determined to constitute a nuisance in its particular situation.

"...what may not be a nuisance in one place may become a nuisance in another....It is also true that a lawful enterprise may be conducted in such a manner as to create a nuisance."
Keenly v. McCarty, 137 Misc. 524, 244 N.Y.Supp. 63 (S.Onondaga 1930).

Thus, whether the acts of defendants, even assuming for the sake of argument that in combination they were legal, constitute
1. A jury trial has been demanded (A- 16). This is the point of the Attorney-General's letter to the Director of Odyssey House of July 11, 1972 (A-194).
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a nuisance, is a question of fact which only the jury could determine. There is more than enough in the record (See, e.g., A-147, 167-70,203) to indicate at least a possibility of such a finding. There is no dispute that if such a nuisance is established, a tenant on adjacent property may recover for damages sustained Bly v. Edison Electric Illumination Co., 172 N.Y.1 (1902); Bowden v. Edison Elec. Ill. Co., 29 Misc. 171, 60 N.Y.Supp. 835 (1899); Garnham v. The Haloid Co., 265 App.Div. 904 (4th Dep't 1942).

The Court below goes on to hold that even were a nuisance otherwise proven, plaintiff could not recover since he never gave notice to defendants and so gave them no opportunity to correct the situation. (A-11 to 12). However, this is not a doctrine in the law of nuisance, and neither of the cases cited by Judge Brieant stand for the proposition he cites. In Dixon v. N.Y. Trap Rock Corp., 293 N.Y. 509 (1944) there had been a notice of harm given, but the fact was totally irrelevant to the finding. American Electronics, Inc. v. Christos Poulos & Co., 43 Misc. 2d 302 (S. Kings 1964) says that persistence of a nuisance after notice is an issue in measuring damages, but that is very different than whether or not a cause of action exists.

Secondly, Mr. Rathborne was a member of the East Fifties Association, an organization whose sole purpose was to give notice to defendants, and to the rest of the community, of the nuisance their activities were causing (A-179-85). Thus, through this agency, he did give such notice.

More significantly than all of this, whether or not plaintiff personally gave "notice", there is no doubt that the defendants had notice, through all sorts of magazine and newspaper articles as well as communications from neighborhood associations

(See, e.g., A-171-185), not to mention from the Attorney-General (A-186-195) and the Housing and Development Administration that their activities constituted a nuisance to other people on the block. To say that in these circumstances Mr. Rathborne would not have a case unless on top of all this public and private objection he personally officially complained makes a mockery of notice. If it is necessary to apply the notice doctrine at all in such circumstances then the Court should hold that from all the complaints defendants were receiving, they should be held to be on constructive notice of Mr. Rathborne's complaint as well. Bierzynski v. N.Y. Central R.R. Co., 31 A.D.2d 294, 297 N.Y.S.2d 457 (4th Dep't 1969), at 460-61 Covey v. Niagara, Lockport and Ontario Power Co., 286 App. Div. 341, 143 N.Y.S.2d 421 (4th Dep't 1955), at 424. At the very least, whether or not defendants had constructive notice would be, as in the Covey case, a question of fact for the jury to determine.

The final point made by Judge Briant, to wit that Mr. Rathborne had to show that the defendants could have abated their nuisance and still carried on their activities is not part of the nuisance doctrine, at least not in New York State, and Judge Briant was able to cite no case whatsoever in support of this proposition (A-13). In fact most of the cases cited in the brief, as well as the traditional nuisance cases of glue factories and dams, involved situations where the only way to avoid creating a nuisance was to cease the activity. However, even were Judge Briant correct on this point, there is not one activity complained of which the defendants were obliged to engage in: the tinning of windows was not mandated by statute: it simply was the most hideous of the procedures technically allowed by §C26-80.0 of the Administrative Code of New York City. The defendants could have sealed the windows

by any one of a number of other means or they could have posted guards in the buildings and still complied with the law. There certainly was no requirement that relocation signs be posted, that drug rehabilitation centers be moved to the block, or that abandoned buildings be allowed to deteriorate and become havens for derelicts.

Conclusion

Apart from the above, there are a number of other facts to be determined by the jury at trial, including whether a sufficient public interest exists for an award of damages on the basis of public, as well as private nuisance¹; whether the requisite intent exists for the award of punitive damages, and the amount of actual damages sustained by the plaintiff.² None of these, however, are relevant to the matters presently before this Court. What is relevant is that (1) although plaintiff was a rent-controlled tenant in one of the two apartments he occupied in the building, even as to that apartment, the statutory harassment remedy was not exclusive since (a) the defendants were not "landlords" within the definition of the statute; (b) the activities complained of did not occur because some of the defendants owned the underlying fee, and none occurred in the premises where plaintiff resided; (c) the complaint is in nuisance, not harassment; (2) giving plaintiff the inferences to which he is entitled on a motion of this nature, the combination of the acts complained of could be found illegal and thus nuisance per se, and even if no such finding were made, a jury could conclude that they constituted a nuisance in the particular circumstances of

1. If these acts did constitute a public nuisance, a jury could conclude that Mr. Rathborne was "specially damaged" thereby and thus entitled to recover on that theory as well as on his private nuisance claim. People ex rel Lemon v. Elmore, 256 N.Y. 489 (1931); Graceland Corp. v. Consolidated Laundries Corp., 180 N.Y.S.2d 644, 7 A.D.2d 89 (1 Dep't 1958), aff. 6 N.Y.2d 900, 190 N.Y.S.2d 708 (1959)

2. There are many items of claimed damages including loss of permanent improvements installed by Mr. Rathborne, moving expense, and psychological damage. -18-

this case. Were it deemed relevant, a jury also could conclude that the defendants had at least constructive notice that the acts they were committing were deemed a nuisance by a number of members of the community, including the members of the East Fifties Association.

The defendants quite correctly claim that the activities of which they were accused are not unique to them and were not unique to this block, but rather with minor variations have been engaged in by "developers" and their agents throughout this City (A-53,189). That is precisely why the matter was investigated by both the Attorney-General and the Housing and Development Administration, and why this case takes on an importance even beyond the not-insignificant damages suffered by Mr. Rathborne. As many of the documents in the appendix make clear, the efforts of these developers and relocation companies to force or "persuade" reluctant tenants to move out of buildings they wish to demolish has caused untold hardships for thousands of New Yorkers. Unfortunately, few of them have had the energy, knowledge or resources to seek relief through legal proceedings. If the dismissal of the within proceeding is sustained, then these builders and relocators will feel free to deplete blocks and neighborhoods in furtherance of their selfish interests without fear of interference by the courts even when a tenant severely damaged by their activities has the resources and interest to pursue a legal remedy.

The single greatest cause of the decline of New York City over the past ten years has been the flight of the middle class, and, at least in the Borough of Manhattan, the single greatest cause of the flight of the middle class has been the destruction of their homes in order to build totally unnecessary office buildings and

equally unnecessary expensive apartments. At the same time the middleclass has been forced from Manhattan, these luxury apartments and offices have been so overbuilt that millions of square feet sit vacant, and in other locations (such as the very block in issue here) the developers have simply abandoned their projects after they have destroyed the community. See, e.g., A-183-5.

This is the framework in which Mr. Rathborne's claim exists. Even without this framework, he would be entitled to at least have his day in court for the reasons set forth earlier. However, given the reality of the situation, if the dismissal of this complaint is sustained, the last hope of neighborhoods for protection against the depredators-in-guise-of-developers -- that if they destroy lives and communities, they will be held liable therefor -- will have been destroyed, and as soon as economics again make such activities viable, the destruction of what remnants of the middle class still remain in our city will continue unabated.

For all of the above reasons, the determination of the court below should be reversed.



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SECOND CIRCUIT COURT OF APPEALS

Index No. 77-7005

PRESCOTT H. RATHBORNE

Plaintiff

against

CITADEL MANAGEMENT CO., INC. et al

Defendant

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF New York

ss.:

The undersigned being duly sworn, deposes and says:

*Deponent is not a party to the action, is over 18 years of age and resides at
920 Middleneck Road, Great Neck, N.Y.*

*That on February 25 19 77 deponent served the annexed
appellant's brief (2 copies) each)
on Nickerson, Kramer, Lowenstein, N essen, Kamin & Soll, and
attorney(s) for Turchin & Topper
in this action at defendants-appellees
919 Third Avenue and 60 East 42 Street, NYC, NY respectively,
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.*

*Sworn to before me
February 25, 1977*

[Signature]
The name signed must be printed beneath

DUKE L. FUNDERBURKE

[Signature]
BRADLEY B. DAVIS
Notary Public, State of New York
No. 30-087-250
Qualified in Nassau County
Commission Expires March 30, 1977